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No. 09-665

Court, U.S.
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In The
Supreme Court of the United States

SAUL GREGORIO MARTINEZ,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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THIS IS NOT A DISPUTE RELATING TO FACTS; THE FACTS OF THIS CASE ARE STRAIGHTFORWARD AND SETTLED, BUT THE LAW IS NOT.

Contrary to Respondent's assertion, this is not a "fact-intensive" case. O11.[1] Respondent does not identify any factual inquiry that this Court needs to make, and none exists. Rather, this case comes to the Court with undisputed facts applied to uncertain laws affecting thousands of people nationwide.

Respondent's Opposition demonstrates that no material facts are in dispute. Martinez admits that his initial asylum application was false. P2-3. Martinez asserts, and Respondent's Opposition does not dispute, that: Martinez was persecuted in Guatemala because of his sexual orientation, P2; Martinez fears for his safety and life if returned to Guatemala, P2-6; Martinez's operative asylum claim under review by the Ninth Circuit was based on persecution for sexual orientation, P5-6; the Government did not oppose Martinez's motion under the Convention Against Torture ("CAT"), 8 C.F.R. § 208.16(c)(2), P5, P16; there is no evidence in the record contrary to Martinez's evidence in support of his CAT claim, P16; and neither the Board of Immigration Appeals ("BIA") nor the

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[1] Citations to the Petition for Writ of Certiorari will be styled, "P___", citations to Respondent's Brief in Opposition will be styled, "O___", citations to Petitioner's Appendix will be styled "PA___", and citations to Respondent's Appendix will be styled, "RA___".

Ninth Circuit offered any substantive explanation for denying Martinez's CAT claim, P16, PA14, PA20-21.[2]

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[2] Respondent emphasizes an important fact that reinforces Martinez's position: Martinez announced his intention to modify his asylum application at his first removal hearing *before* the law clearly recognized persecution for sexual orientation as a basis for seeking asylum. *See* O6, RA32a-33a. Respondent concedes that Martinez announced at the "*first session* of his removal hearing" on March 26, 1996 that he would be filing a new sworn declaration with different reasons for seeking asylum. O6 (emphasis added). On April 4, 1996, the Immigration and Naturalization Service ("INS") "formally" and firmly recognized for the first time that sexual orientation could serve as a basis for seeking asylum, rather than as a potential basis for deportation. *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005). In a footnote, Respondent states that Judge Pregerson's dissent on this point is "not complete," O10 n.3, but Respondent cites no authority to support its contention that "precedent" made it clear that sexual orientation could serve as a basis for asylum before April 4, 1996. Respondent ignores the Ninth Circuit's holding in *Karouni* that the INS's formal shift in treatment of homosexuals first occurred on April 4, 1996. Martinez admitted that his first asylum application was false, and modified his asylum application on April 23, 1996. PA16.

RESPONDENT'S OPPOSITION REAFFIRMS THAT CIRCUIT SPLITS EXIST ON IMPORTANT ISSUES OF LAW.

The Concessions And Omissions In Respondent's Opposition Demonstrate That, In Pre-REAL ID Act Cases, Some Circuit Court Decisions Look "Only" To Inconsistencies That Go To The "Heart" Of An Asylum Claim And Some, Like The Decision At Issue In This Case, Do Not.

Respondent concedes that "a number of circuits . . . have held that inconsistencies, inaccuracies or omissions can be the basis for adverse credibility findings ***only*** if they are material and go to the 'heart' of a petitioner's claim." O4 (emphasis added). Martinez agrees that a "number of circuits," most in fact, adopt this rule for cases commenced before the effective date of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 303 (2005) ("REAL ID Act") (asylum standard codified at 8 U.S.C. § 1158(b)(1)(B)(iii)). P8-10. Respondent addresses several circuit decisions that *reinforce* the prevalent general rule. O11-12 n.4; *see also* P9-10 n.4. But, Respondent fails to address numerous circuit court decisions cited by Martinez that contribute to the split in authority by ***not*** adhering to this rule. P11-12 (citing, *e.g.*, *Siewe v.*

Gonzales, 480 F.3d 160, 170 (2d Cir. 2007) and *Yongo v. I.N.S.*, 355 F.3d 27, 33-34 (1st Cir. 2004)).[3]

The Ninth Circuit's decision in the present case also does not adhere to the prevalent rule even though it summarily claims to do so in language seized on by Respondent. *See* PA13, O10. Although the Ninth Circuit majority asserts that it "goes without saying" that Martinez's false statements went to the heart of Martinez's claim, it is clear from reading the opinion that the court actually was referring only to Martinez's admittedly false *initial* application and not to his *operative* application which was based on persecution for his sexual orientation. PA13.[4]

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[3] Contrary to Respondent's contention, O4, the First Circuit's decision in *Toure v. Ashcroft*, 400 F.3d 44 (1st Cir. 2005), does not adhere to the prevalent rule. In *Toure*, an asylum applicant was found not to be credible because she was unable to explain inconsistencies in her testimony in support of her *husband's* previously adjudicated asylum claim before a *different* immigration judge. *Id.* at 47-48. The First Circuit held that the inconsistencies went "to the heart" of the applicant's "credibility," but did not hold that they went to heart of the applicant's (*i.e.*, the wife's) pending *claim*. *Id.* at 48.

[4] Respondent appends the Ninth Circuit's July 25, 2003 decision that rejected the BIA's *de novo* adverse credibility determination denying Martinez's claim for asylum for fear of persecution based on his sexual orientation because "[t]he BIA provided no 'specific cogent reasons'" for rejecting that claim. RA2a. Like the Ninth Circuit's 2009 decision at issue, the Ninth Circuit's 2003 decision was decided over a dissenting opinion. Thus, this case alone has generated two split decisions from two different panels of the Ninth Circuit based on the same set of facts.

Here, nothing so vital to the outcome can "go without saying."

Respondent fails to explain how courts on the other side of the split – *i.e.*, those that properly apply the prevalent rule – could come to the same conclusion that the Ninth Circuit did here. For example, Respondent attempts, but fails, to distinguish the Third Circuit's decision in *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004). O11-12 n.4. In *Guo*, the Third Circuit recognized that there was a fundamental difference between an asylum claim based on religious persecution (which was found not to be credible) and a later claim based on a fear of forced sterilization, and held that "[t]he legitimacy of an initial credibility determination does not . . . justify denial of all subsequent applications for asylum." *Id.* at 562. Given the undisputed facts of this case, the Third Circuit would have come to a different conclusion than the Ninth Circuit, and would have ruled in Martinez's favor because his prior false statements did not go to the heart of his subsequent, *operative* asylum claim.

Respondent Does Not Dispute That There Is A Split In The Circuits On The Proper Approach To Claims Under The Convention Against Torture.

Respondent challenges Martinez's interpretation of the Ninth Circuit's decision with respect to his CAT claim, O14, but does not dispute that the Eighth Circuit stands in conflict with the Second, Third,

Sixth and Seventh Circuits as to whether an adverse credibility determination may be imported to dispose of a CAT claim, P15-19. Thus, it is undisputed that a split exists. The only issue is whether this case invokes the split. It does.

Respondent Fails To Defend The Ninth Circuit's Cursory Nod To Martinez's Claim Under The Convention Against Torture.

Like Respondent's Opposition, the Ninth Circuit's and BIA's decisions focus their opinions and emphases on the adverse credibility determination. O6-9, PA2-14, PA19-20. That determination suffuses every aspect of those rulings as well as Respondent's Opposition. Given the extensive weight placed on the adverse credibility determination, there is no reason to believe that the Ninth Circuit simply ignored the issue in its brief ruling on the CAT claim. PA14 n.1.

Respondent's suggestion that there "might have" been "some other reason" for rejecting Martinez's CAT claim is pure conjecture, and is not supported by the Ninth Circuit's decision or the law. O14. Unlike in civil and criminal cases, circuit court review of agency determinations, including those of the BIA, is limited to the rationales offered by the agencies involved. *See Ramirez-Altamirano v. Holder*, 563 F.2d 800, 804 (9th Cir. 2009). "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, *must judge the propriety of such action solely by the grounds invoked*

by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative decision by substituting what it considers to be a more adequate or proper basis." *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis added).

Two crucial characteristics of the decisions by the BIA and the Ninth Circuit are undisputed: neither offers any substantive explanation for rejecting Martinez's CAT claim; and the *only* evidence on the CAT issue favored Martinez. P16, PA14, PA20-21. The Ninth Circuit's published decision in *Martinez* – like published decisions from the Eighth Circuit – sets precedent that vituperative adverse credibility determinations (or, worse yet, no substantive rationale at all) provide sufficient grounds to deny a CAT claim. P19. That result cannot be squared with decisions from the Second, Third, Sixth and Seventh Circuits, which correctly hold that CAT claims must be evaluated independently from adverse credibility determinations. P17-19.

RESPONDENT'S OPPOSITION REINFORCES THAT CERTIORARI IS TIMELY AND NECESSARY TO CLARIFY IMPORTANT ISSUES OF LAW IMPACTING THOUSANDS OF PEOPLE AND A HUGE PROPORTION OF THE CIRCUIT COURTS' DOCKETS.

Respondent does not disagree that thousands of pre-REAL ID Act cases involving adverse credibility determinations are still working their way through

the lower courts every year, and that appeals from the BIA represent thirty-five to forty percent of the dockets of the Second and Ninth Circuits. P13-14. The Opposition notes that the number of pre-REAL ID Act cases is "necessarily declining." O13. Respondent cites, however, to a new decision from the Ninth Circuit, *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010), that reinforces how relatively unusual post-REAL ID Act cases remain at the appellate court level: "The Ninth Circuit has only recently begun to apply the [REAL ID Act] to adverse credibility determinations." Pre-REAL ID Act cases, and the proper analysis of adverse credibility determinations, likely compose a larger percentage of appeals in the circuit courts than *any other kind of case*, and will continue to do so for the foreseeable future. P13-14.[5]

Respondent also does not dispute that the danger of confusing adverse credibility determinations with CAT claims will *increase* with the passage of the REAL ID Act because judges in post-REAL ID Act cases have more discretion to make adverse credibility

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[5] *See* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf (statistics showing that the largest percentage of cases in the Second and Ninth Circuits comes from the BIA, and that over 15% of cases in all circuit courts combined come from the BIA); and Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Texas Int'l L. J. 185, 187 (Winter 2008) (noting, with citations, that "[a] substantial percentage of . . . immigration cases concerns asylum, and credibility determinations are the most challenged aspect of asylum claims").

determinations. P20-21. Delay in clarifying the proper relationship, if any, between adverse credibility determinations and CAT claims will adversely affect great numbers of cases and promote uncertainty in the law.

CONCLUSION

Without this Court's guidance, immigration judges, the BIA and circuit courts across the country will not have a clear understanding of whether a false statement in a pre-REAL ID Act case must actually go to the heart of an applicant's operative application. Nor will they have an understanding of whether or when adverse credibility determinations regarding asylum claims may be applied to dispose of a CAT claim. Given the massive numbers of immigration cases weighing down dockets on these issues, it is critical that the questions presented be answered.

Respectfully submitted,

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